United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-6010

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

HOWARD S. KATZ,

Plaintiff,

Vs.

UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE, DONALD ALEXANDER, Commissioner of Internal Revenue, JOHN CLIFFORD, Revenue Officer, STEPHEN J. DAVIDSON, Revenue officer,

Defendants.

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P/S

REPLY BRIEF

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A PURPOSE

The purpose of this brief is to rebut the contentions made in the brief of Defendants-Appellees IRS et al.

This case arose when Plaintiff-Appellant Katz refused to waive the statute of limitations on an IRS audit. The IRS then made a false assessment against him, an assessment which to the best of its knowledge it knew to be false, and seized Katz' bank accounts and stock when he did not pay this fraudulent assessment. It now contends that it is due process of law to have the sole judge of the case be its sister agency, the Tax Court.

Katz' case is based on the principle that a man may not be a judge in his own case. This ancient legal principle is codified in U.S. law via the Constitutional requirement that no man be deprived of life, liberty or property without due process of law. For the executive branch of the Government to be the judge in a case to which it is a party is the most elementary and obvious violation of this requirement. It has long been established in case law, and the U.S. Attorney's attempt to prove the opposite is an elementary study in pseudo-reasoning.

The only inference to be drawn from the U.S. Attorney's argument is that he must have relied merely on the digests of the cases he cites. With one exception they do not prove what he cites them to prove, and in some cases they prove just the opposite. For example, the definitive case which Katz intends to offer, a Supreme Court decision (Williams v. United States, 289 U.S. 579) upholding his position as to the validity of Tax Court was discovered by researching Stix Friedman & Co. v. Coyle, 467 F.2d 474, which the U.S. Attorney cites for the opposite position.

B REFUTATION OF U.S. ATTORNEY'S CASES

1) The statutes prohibiting the enjoinment of taxes, 26 U.S.C. 7421 and 2201:

It should be remembered that Katz is not contending that any particular statute is unconstitutional per se. He is contending that the net result of what has been done to him is unconstitutional.

The distinction arises from the fact that laws are always general principles; while what appears before a court is always a particular case. The business of a court is always to take the general principles given in the law and to apply them to the particular case before it and thus to make a ruling in accordance with the law.

> "The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.
>
> Alexander Hamilton
> Federalist No. 78
> (my underline)

Katz does not argue that all of these laws are unconstitutional or even that any of them are. Katz argues that there is an "irreconcilable variance between" the Congressional enactments cited by the U.S. Attorney and the due process and good behavior clauses of the Constitution. Since all laws are principles, that is, they are abstractions, the network of laws cited by the U.S. Attorney might not be in conflict with the Constitution in some other case. Katz only argues that they are in conflict in his. And when they are in conflict, as Hamilton pointed out, "the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents." As the Supreme Court noted in Watson v. Buck, 313 U.S. 387, 402:

> "A law which is constitutional as applied in one manner may still contravene the Constitution as applied in another. Since all the contingencies of attempted enforcement cannot be envisioned in advance of those applications, courts have in the main found it wiser to delay passing upon the constitutionality of all the separate phases of a comprehensive statute

> until faced with cases involving particular provisions as specifically applied to persons who claim to be injured."

As shown below there are specific instances in which the courts specifically disregarded as unconstitutional statutes similar to 26 U.S.C. 7421 and 2201 in situations similar to those of Katz.

2) Cases relating to Enochs v. Williams Packing & Navigation Co:

The evolvement of the law in relation to taxpayers' rights against the government has shown a steady trend in favor of the taxpayers. Throughout the 19th century summary procedure was justified as being within due process of law by the argument that under a summary procedure the due process occurred after the seizure of the property and that the constitutional requirement did not specify when due process was to take place.

By the 1930's with the creation of Tax Court and the decision in Phillips v. Commissioner, 283 U.S. 589 (1931) taxpayers' rights had been extended. They now had a two-part procedure. Part one corresponded to the old summary judgement: pay the tax and then go to district court. But in addition he had a second part: contest the tax in Tax Court. By giving the taxpayer a choice between these alternatives a wider range was opened to him.

Shortly thereafter in Miller v. Standard Nut Margarine, 384 U.S. 498, the Court extended taxpayers' legal rights even further, holding that even this two-part procedure did not satisfy due process of law in some cases. In regard to a statute, R.S. 3224, identical in wording to 26 U.S.C. 7421 prohibiting the enjoinment of a tax, the court said:

> "And this court likewise recognizes the rule that, in cases where complainant shows that in addition to the illegality of an exaction in the guise of a tax there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the collector." supra at 509. (my underline)

Speaking further of R.S. 3224 the Court said:

> "It has never held the rule to be absolute, but has repeatedly indicated that extraordinary and exceptional circumstances render its provisions inapplicable." supra at 509-10

So the provision that tax collection may not be enjoined has already been held unconstitutional in certain circumstances. Further:

> "It requires no elaboration of the facts found to show that the enforcement of the Act against respondent would be arbitrary and oppressive, would destroy its business, ruin it financially and inflict loss for which it would have no remedy at law. It is clear that, by reason of the special and extraordinary facts and circumstances, 3224 does not apply." supra at 510-11 (my underline)

It is precisely these circumstances which apply to Katz.

It is clear that by Miller v. Standard Nut Margarine the Court opened up a hole. The Court's purpose in Enochs v. Williams Packing & Navigation Co., 370 U.S. 1 (1962) was to define just how big that hole was.

To review: Taxpayers had always been allowed access to district court after paying the tax. Then they were given the choice of that or of Tax Court. Finally, under extraordinary circumstances even this was not sufficient to give due process of law.

Now where does Katz stand in relation to this gradual development? It is clear that he stands right at the beginning in circumstances which have always been considered beyond the bounds of the tax collector even in the earliest times. For under all circumstances the taxpayer has had ultimate recourse to district court to fight his claim. The U.S. Attorney is attempting to turn the clock back to before the 19th century and argue that Katz does not even have that right.

The U.S. Attorney cites Williams Packing, "Americans United" and Bob Jones as though they were cases wherein the taxpayer did not have access to the district courts. This is exactly contrary to fact. The taxpayers in these cases were in

essentially different circumstances from Katz, and several times the Court stated that it was that difference which made the difference in its decision. For example, in Williams Packing Williams Packing had transfered its assets to a sister corporation, DeJean, and then claimed that it could not pay the tax and sue for a refund. Before the Court ruled against Williams Packing it satisfied itself that this claim was false. It said:

> "...the Government suggests that respondent has denuded itself of assets in anticipation of its tax liability, that DeJean's assets should be considered as belonging to respondent, and that, in any event, the respondent corporation may pay the assessment for a single quarter and then sue for a refund." supra at 370 U.S. 5

In Bob Jones U. v. Simon, 416 U.S. 725 Bob Jones U. clearly had opportunity for judicial review: The Court stated:

> "This is not a case in which an aggrieved party has no access at all to judicial review. Were that true, our conclusion might well be different. ...petitioner may pay income taxes...and then bring suit for a refund." supra at 746

And "Americans United" Inc. did not even plead due process.

3) Cases actually relating to Katz' circumstances:

It is likely that the U.S. attorney was pressed into citing cases such as these for lack of any real cases to cite. For the very opposite principle has long been settled law. For example, in Owensboro Ditcher & Grader Co. v. Lucas, 18 F.2d 798 (1927) a statute authorizing the Commissioner of Internal Revenue to assess and collect a tax was held unconstitutional as a denial of due process. In this case, as with Katz, the plaintiff did not go before the Board of Tax Appeals and did not have sufficient money to pay the tax and sue for a refund. The Court said:

> "The bill charges that section 280 of the Revenue Act of 1926, under which the Commissioner of Internal Revenue and the defendant acted and are acting, is violative of the Fifth Amendment to the Constitution of the United States, in that it deprives plaintiff of its property without due process of law... and of section 1 of Article 3 in that it undertakes to vest judicial power in the Commissioner of Internal Revenue. As a basis of equitable jurisdiction, it is alleged that plaintiff has not sufficient money with which to pay these claims...that it has no adequate remedy at law, and that it will suffer irreparable injury unless the defendant is enjoined from levying upon and selling its property." supra at 800

And then concluded:

> "That section 280 of the Revenue Act of 1926, if enforced, as the bill alleges is threatened to be done in this case, will result in denying to the plaintiff due process of law within the meaning of the Fifth Amendment to the Constitution of the United States, seems too obvious for extended discussion...." supra at 800

Katz' basic contention in this appeal is that he has been denied access to the courts. On this elementary principle there can be no argument.

> "Amongst rights of American citizens under our form of Constitutional Government, no right is treasured more than the right of every citizen to have his day in court. Courts are instituted with the responsibility and high duty to see that this, as well as all fundamental rights, are maintained inviolate."
>
> Collins v. Biron, 56 F. Supp. 357 (1944)

This, however, does not get to the point. The U.S. Attorney claims that the opportunity Katz had to go to Tax Court afforded him adequate judicial review. Katz denies this. The case thus hinges on the validity of Tax Court.

Further research has led Katz to discover that there is ample precedent for the resolution of this question. The Supreme Court has long recognized two kinds of courts in this country, constitutional courts and legislative courts. Constitutional courts are those created by virtue of Article III of the Constitution and must meet the requirements of Article III. But there are also legislative courts which serve a lower function. In Glidden v. Zdanok, 370 U.S. 530, 544 (1962) the Court cited an old decision of Justice John Marshall on the territorial courts of Florida:

> "These Courts, then, are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States." (1 Pet 546)

Tax Court is a legislative court and is valid as such, but not anything more.

Of course the admission of these legislative courts raises serious questions. To what extent are they capable of exercising the judicial power? Could we, for

example, set up a legislative court to try people accused of murder and thus circumvent the due process of law guaranteed to such people through the constitutional courts? The answer is clearly no.

It should be noted that, although property is generally considered a less important right than liberty or life, the Fifth Amendment in its phrasing "life, liberty or property" protects them equally, (Dept. of Mental Hygiene v. Hawley, 379 F.2d 22 (1963), Clark v. State, 135 S.E.2d 270 (1964) and if property can be disposed of without recourse to a constitutional court, then so can life and liberty.

Could it be argued that the opportunity of a person convicted in such a legislative court to appeal the decision provided him adequate opportunity for having his day in court and adequate guarantee of his constitutional rights? No, due process cannot be given at the appellate level. In Luckenback Steamship v. United States, 272 U.S. 533, 536 (1926) the Supreme Court held that:

> "...the well settled rule applies that an appellate review is not essential to due process of law, but is a matter of grace."

If due process must occur at the first level or not at all, then where does this leave the legislative courts? The answer is that they are essentially administrative bodies called into function where either the party has no right to due process or due process is guaranteed to him through other means.

In Williams v. United States, 289 U.S. 579 (1932) the Supreme Court upheld this position. Speaking of the Court of Claims (and legislative courts in general) it cited an old decision of the very man responsible for the distinction between constitutional and legislative courts, John Marshall:

> "The persons who are directed by the act of Congress to ascertain the debt due from a delinquent receiver of public money, and to issue process to compel the payment of that debt, do not compose a court ordained and

established by congress, nor do they hold offices during good behaviour. Their offices are held at the pleasure of the President of the United States. They are, consequently, incapable of exercising any portion of the judicial power, and the act which attempts to confer it, is absolutely void."

Ex Parte Randolph, 2 Brock 447, 20 Fed. Cas. 242, 254

When the U.S. Attorney (footnote, page 6, Brief of Defendants-Appellees) cited Congress' establishment of Tax Court "as a court of record under Article I," he was affirming that Tax Court was a legislative court. Katz does not deny this. He agrees with it. But Katz goes further and points out that the judges in such a legislative court do not "hold offices during good behaviour. Their offices are held at the pleasure of the President of the United States. They are, consequently, incapable of exercising any portion of the judicial power, and the act which attempts to confer it, is absolutely void." Tax Court is a perfectly valid institution as it is presently used. In the two-part procedure described in Phillips, part 1 consists of the old summary process which in the 19th century constituted due process (pay tax first and then go to court) and part 2, Tax Court, allows an additional avenue for those who do not wish this inconvenience.

4) Review of other cases cited by the U.S. Attorney:

The cases which the U.S. Attorney cites to prove the validity of Tax Court all confirm this. They prove the validity of Tax Court as a legislative court and as a procedure for people who have due process guaranteed to them by other avenues.

Stix Friedman & Co. v. Coyle, 467 F.2d 474 is an 8th circuit decision which is based on Williams above. Katz, who is appearing pro-se and has limited access to law books and limited experience in researching cases, wishes to thank the U.S. Attorney for leading him to this definitive decision upholding his position.

In Nash Miami Motors v. Commissioner, 358 F.2d 636 the fifth circuit simply affirmed the validity of Tax Court as a legislative court and upheld it in a case where access to a constitutional court was one of the taxpayer's alternatives:

> "The Supreme Court has clearly and consistently held that functions such as those performed by the Tax Court can be entrusted by Congress to a legislative court, the judges of which are not endowed with the guarantees of Article III, §1 of the Constitution." supra at 637

> "As the Supreme Court recognized in Flora v. United States, 362 U.S. 145, 80 S. Ct. 630, 4 L. Ed. 2d 623 (1960), Congress has given the taxpayer two possible remedies: In certain circumstances he may litigate in the Tax Court subject to review by the courts of appeals and by the Supreme Court; in certain other circumstances he may sue in the district court or Court of Claims subject to appellate review. The real thrust of petitioners' complaint is simply that they would have preferred to litigate their case in the district court without first having paid the taxes." supra at 638

Again in Martin v. Commissioner 358 F.2d 63 the 8th circuit held the same thing. Speaking of the two-part procedure of Phillips it said:

> "In neither event does the procedure afforded deprive the taxpayer of ultimate recourse to the courts for proper judicial redress or impinge upon the judicial function reserved to the courts established and authorized by Article III of the Constitution."

Katz has been deprived of the right to litigate his case in district court, and that is the deciding factor in the above cases.

The U.S. Attorney is thus left with just one case, Willmut Gas & Oil Co. v. Fly, 322 F.2d 301 to prove his contention that it is due process of law to allow Katz just the avenue of a legislative court. Even this case is not parallel to that of Katz because in that case the taxpayer was seeking a refund; i.e., he had paid the tax prior to the action. This makes his circumstances different from Katz, who has been denied access to district court because he cannot pay the alleged tax.

Katz will concede that the dicta in Wilmut Gas & Oil support the U.S. Attorney's contention that a legislative court can give due process of law. However, this one case must fall before the authority of Williams, a Supreme Court ruling which has never been overturned.

With this one exception the Government cannot find cases to uphold its position because they do not exist. If this Court were to rule that Katz could be deprived of property after being afforded recourse only to a legislative court, it

would be turning the clock back several centuries on the evolution of human rights. The decision would be an anomoly in total disregard of fundamental principles of equity (no man may be a party to his own case), the Bill of Rights (due process) and the authority of the Supreme Court (Williams).

5) Argument that plaintiff-appellant Katz' indigency denies due process:

Katz further alleges that the levy procedures of the IRS are unfair and a denial of due process because the very fact of the procedures has made Katz indigent (by seizing all of his wealth). Katz is thus in the position of either being forced to seek charity (and inferior legal help) or do without legal help altogether. Katz has never taken charity in his life and does not want to start now. The fact that he is in this situation is a denial of due process of law.

The U.S. Attorney's assertion that the courts have ever rejected this claim is false, and the cases he cites are as irrelevant as his other cases. In Avco Delta Corp. Canada v. United States, 484 F.2d 692 the court did not reject the plea of indigency it merely postponed consideration until after the trial. It cited Illinois Redi-Mix Corp. v. Coyle, 360 F.2d 848 as saying:

> "The claim in substance, is that the vendor corporations will be denied a fair trial in the Tax Court at some time in the future if a portion of the interpleaded fund is not released.... That can be decided only after the trial. Therefore, the issue is not ripe for judicial determination."

In Lloyd v. Patterson, 242 F.2d 742 the same situation obtained. The court stated:

> "Under the circumstances before us, it would be mere speculation for us to now decide that Lloyd would be denied his constitutional rights of a fair hearing in the civil matter to be heard some time in the future because the United States has made unavailable to him his properties due to the tax lien imposed under the jeopardy assessment. Only upon a posttrial study of the whole case can it be determined whether Lloyd's constitutional rights were violated."

Lloyd, unlike Katz, had counsel.

C SUMMARY

If the IRS' case is upheld, it would be a tremendous setback for civil liberties and turn the clock back several hundred years in holding that due process of law could be satisfied by a legislative court, and it would also be a violation of the Supreme Court decision in Williams v. United States, 289 U.S. 579 which held that judges of legislative courts are "incapable of exercising any portion of the judicial power."

Finally, the Court is reminded that:

> "It is elementary that tax laws are to be interpreted liberally in favor of taxpayers.... Doubts must be resolved against the Government and in favor of taxpayers." Miller v. Standard Nut Margarine, 284 U.S. 498, 508.

and

> "Liberal construction is to be accorded to a pro-se complaint." Sigafus v. Brown, 416 F.2d 105, 106 (1969, 7th circuit).

Katz wishes to thank the pro-se clerk for the Court of Appeals, Mrs. Valentine, for her assistance and competence.

D CONCLUSION

Judge Tyler's decision should be reversed. A declaratory judgement should be issued ordering that Katz' money be returned to him and declaring that the IRS has no authority to seize his wealth without proving before a constitutional court that he owes a tax.

Howard S. Katz